STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

vs

MANTREASE DATRELL DEQUAN SMART,

Defendant-Appellee.

_____/

Supreme Court Docket No. 149040

Court of Appeals Docket No. 314890

Lower Court No. 11-29652-FC

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SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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JURISDICTIONAL STATEMENT

The Defendant-Appellee agrees with the Prosecutor's jurisdictional statement.

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does MRE 410(4) allow a prosecuting attorney's police agent to act on behalf of the prosecuting attorney in conducting plea discussions and should the two part analysis of People v Dunn continue to guide the application of MRE 410(4)?

Defendant-Appellee would answer "yes."

The trial court would answer "yes."

The Court of Appeals would answer "yes."

The Plaintiff-Appellant would answer "no."

STATEMENT OF APPLICABLE STANDARD OF REVIEW

The applicable standard is set forth in the argument portion of this brief.

STATEMENT OF FACTS

The Plaintiff's statement of facts is complete and accurate and will be supplemented in the Argument portion of this brief where necessary.

ARGUMENT

I. MRE 410(4) ALLOWS A PROSECUTING ATTORNEY'S POLICE AGENT TO ACT ON BEHALF OF THE PROSECUTING ATTORNEY IN CONDUCTING PLEA DISCUSSIONS AND THE TWO PART ANALYSIS OF PEOPLE V DUNN SHOULD CONTINUE TO GUIDE THE APPLICATION OF MRE 410(4).

Standard of Review: The Supreme Court reviews de novo lower courts' interpretations and applications of statutes and court rules. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

The Supreme Court has asked the parties to submit supplemental briefs that include discussion of 1) whether, pursuant to MRE 410(4), "plea discussions" must directly involve a prosecuting attorney or whether a prosecuting attorney's agent may act on behalf of the prosecuting authority and, if so, under what circumstances the agent's discussions constitute "plea discussions" and 2) whether the Supreme Court's two part analysis for determining if a statement was made "in connection with" a plea offer, established in *People v Dunn*, 446 Mich 409; 521 NW2d 255 (1994), should continue to guide the application of MRE 410.

In summary, Defendant-Appellant says that a prosecuting attorney's agent, specifically a police officer, may act on behalf of the prosecuting authority in conducting interviews with defendants as part of the plea discussion process. The agent's discussions are "plea discussions" when the prosecuting attorney has authorized the agent to interview a defendant, whether or not the agent is actually negotiating with the defendant. Defendant-Appellant believes that the two part analysis in *People v Dunn* should continue to guide the application of MRE 410.

A. **Must plea discussion directly involve a prosecuting attorney?**

The first question posed by this Court's order of September 17, 2014 is whether plea discussions must directly involve a prosecuting attorney or whether a prosecuting attorney's agent may act on behalf of the prosecuting attorney. Both the Genesee County Prosecutor and amicus Prosecuting Attorneys of Michigan agree with the Defendant that a prosecuting attorney's agent may act on behalf of the prosecuting attorney. (Amicus brief, p. 7; Prosecutor's application, p. 44-45).

In *United States v Cross*, unpublished opinion per curiam of the Sixth Circuit Court of Appeals, issued March 13, 1992 (Docket No. 90-2212), slip op 5, the Court said, with respect to FR Crim P 11:

> We adopt the view that participation by the government attorney in plea negotiations is sufficient to trigger the protection of Rule 11. While statements made by a defendant to law enforcement officers during the investigation stage, without more, are not protected by the Rule, statements made by a defendant to a law enforcement officer during a plea bargaining process in which the government attorney participates should be protected by the Rule. Otherwise, a law enforcement officer could act, as in the present case, in the role of an intermediary between a defendant and the government attorney in conducting plea negotiations and yet those discussions would not be protected by the Rule.

The language of FR Crim P 11(e)(6)(D) as adopted in 1979 was identical with that of FRE 410(4). It has now been replaced with FR Crim P 11(f) which simply incorporates FRE 410.

Similarly, in an unpublished case from the Sixth Circuit Court of Appeals, *United States v O'Neal*, unpublished opinion per curiam of the Sixth Circuit Court of Appeals, issued April 28, 1993 (Docket No. 92-5995), slip op 9 said that:

> This rule [FRE 410(4)] can be fairly read to apply to statements made to a government attorney during the course of plea discussions or to an agent whom the government attorney has authorized to engage in plea discussions.

Both *O'Neal* and *Cross* are based on *United States v Serna*, 799 F2d 842 (CA 2, 1986), cert. denied, 481 US 1013 (1987), overruled on other grounds, *United States v DiNapoli*, 8 F3d 909, 914 fn 5 (CA 2, 1993). In *United States v Serna*, supra, 799 F2d 842, 849, the Court said:

> We think the rule [FRE 11(e)(6)(D)] can be fairly read to require the participation of a Government attorney in the plea discussions, but not necessarily his physical presence when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions. See [*United States v Grant*, 622 F2d 308 (CA 8, 1980)] at 313. Because the agents were acting under the AUSA's authority in determining whether Serna would in fact cooperate, Serna's statement was properly excluded.

See also *United States v Swidan*, 689 F Supp 726, 728 (ED Mich 1988) which notes that "As other courts have recognized, limiting the rule's [FRE 410(4)] application only to prosecuting attorneys contravenes the rule's purpose of encouraging plea discussions." and *United States v Ross*, 588 F Supp 2d 777, 782-783 (ED Mich 2008), which adopts the reasoning of *O'Neal* and *Cross*.

cf. *United States v Marks*, 209 F3d 577, 582 (CA 6, 2000), which suggests that statements to an FBI agent are never made in the course of plea discussions. However, this is dicta, since the Court also held that there were no plea discussions because there was already a signed plea agreement.

B. Should the two part analysis in *People v Dunn* should continue to guide the application of MRE 410?

The amicus has suggested using the five factors found in *United States v Morgan*, 91 F3d 1193, 1196 (CA 8, 1996): (1) no specific plea offer was made; (2) no deadline to plead was imposed; (3) no offer to drop specific charges was made; (4) no discussion of sentencing guidelines for the purpose of negotiating a plea occurred—only a generalized discussion to give the suspect an accurate appraisal of his situation occurred; and (5) no defense attorney was retained to assist in the formal plea bargaining process. The *Morgan* case does not suggest that

all five factors must be present, only that if none of these factors are present, then there are no plea discussions. In the present case, there was a plea offer that was pending since Mr. Smart had signed a written plea agreement but was having second thoughts and had not yet tendered his plea. He certainly was represented by counsel at both sessions. There was a deadline because there was a pending case of armed robbery and carjacking with a trial date of June 9, 2011, the day after the second session, and the day on which Mr. Smart entered his guilty pleas in the armed robbery and carjacking case.

In *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994), this Court advanced a two part analysis to determine if a statement was made "in connection with" a plea offer: First, the trial court should determine whether the defendant exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, the trial court should determine whether the defendant's expectation was reasonable given the totality of circumstances.

While *People v Dunn* was decided before MRE 410(4) was amended to require "plea discussions with an attorney for the prosecuting authority", there is no need to replace its two tier analysis with a new test. It has support in a number of federal cases that were decided after FRE 410(4) was amended to require the involvment of a prosecuting authority. For example, *United States v Swidan*, supra, 689 F Supp 726, 728 used this test:

> The first prong is subjective. Under it the court determines whether at the time of the statement the accused had a subjective expectation that he was negotiating a plea. The second prong is objective. Under it the court determines whether that expectation was reasonable under the circumstances.

This was adopted from *United States v Robertson*, 582 F2d 1356, 1366 (CA 5, 1978), a case decided before FRE 410(4) was amended. However, this two part, subjective and objective, approach has been followed by other federal appellate courts after FRE 410(4) was amended. See for example *United States v Conaway*, 11 F3d 40, 42 (CA 5, 1993); *United States v Merrill*,

685 F3d 1002, 1013 (CA 11, 2011); *United States v Sitton*, 968 F2d 947, 957 (CA 9, 2010); and two unpublished cases from the Sixth Circuit, *United States v Cross*, supra, slip op 5, and *United States v Little*, unpublished opinion per curiam of the Sixth Circuit Court of Appeals, issued December 6, 1993 (Docket No. 92-6719), slip op 3. See also *Calabro v State of Florida*, 995 So 2d 307, 321 (2008), which uses the Robertson two-tier test, and which recognizes that "a majority of federal courts also apply the Robertson two-tier test to determine whether a statement is made in connection with plea negotiations and is, therefore, inadmissible." *Id*, 321 fn 5. *State of North Dakota v Genre*, 712 NW2d 624, 635 (2006) uses both the Robertson two-tier analysis and the five Morgan factors.

c. **Application.**

Mr. Smart had another case in which he was charged with armed robbery, carjacking, and possession of a firearm during the commission of a felony. With respect to that case, he had plea discussions with Detective Sergeant Mitch Brown on March 13, 2011. The prosecutor does not dispute that this meeting was authorized by Assistant Prosecuting Attorney Richmond Riggs and that MRE 410(4) would bar the use of any statements made by Mr. Smart during that meeting. During that meeting Mr. Smart offered information about a homicide that had occurred on May 31, 2010.

Mr. Smart was not satisfied with the plea agreement that was negotiated by his first lawyer, Patricia Lazzio. (tr., 12/12/12, 6; Appendix 272A). Another meeting was arranged with Detective Sergeant Brown and Mr. Smart and his lawyer on June 8, 2011.

Judge Yuille implicitly found that Mr. Smart's expectation that plea discussions would take place on June 8, 2011 was reasonable. Judge Yuille found that "Mr. Smart was of the belief that if he were to meet with Mitch Brown again, he might be able to secure a better plea agreement." (tr., 12/12/12, 6; Appendix 272A). Judge Yuille said that he could not discern a

difference between the initiation of the June 8 meeting from that of the first meeting, which indisputedly occurred during plea discussions. (tr., 12/12/12, 8; Appendix 274A). As the Court of Appeals said in its opinion, page 5, Judge Yuille was well aware of the prosecutor's argument that Mr. Smart's expectation was not reasonable. The Court of Appeals found that the trial court's finding that Mr. Smart's expectation of a better deal was reasonable was not clearly erroneous. *People v Smart*, 304 Mich App 244, 254; 850 NW2d 579 (2014). A trial court's findings of fact at a suppression hearing will not be disturbed on appeal unless they are clearly erroneous. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009); *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

There is no dispute that the second meeting was authorized and in fact encouraged by the prosecuting authority. The prosecutor's position has been that the purpose of the second meeting was get more information from Mr. Smart about the homicide and to tell him that the plea agreement would not get any better than what had been offered. While it is true that Sergeant Brown was not authorized to negotiate a better deal for Mr. Smart at the second meeting, he also was not authorized to negotiate a deal at the first meeting. His role at both meetings was to get information from Mr. Smart and evaluate Mr. Smart's honesty and value as a possible witness in the homicide case. The prosecutor acknowledges that plea discussions occurred during the first meeting. Sergeant Brown told Mr. Smart that he would "give this information to the Prosecutor and they would be very interested in hearing what you just told me." *People v Smart*, supra, 304 Mich App 244, 255. As the Court of Appeals said, this statement could have caused Mr. Smart to believe that the prosecutor would see Mr. Smart as a more valuable witness than was previously believed, and lead to a better deal. As it happened, the plea agreement did improve. There two "tweaks" that appear from context to be: 1) the prosecutor would not oppose boot camp; and 2)

Mr. Smart would not be charged in the homicide case if he cooperated and testified truthfully. (tr., 6/9/11, 3-4; Appendix 48A-49A).

This is not a case such as *United States v Marks*, supra, where the defendant talked to the FBI after signing a written plea agreement and there in fact were no further plea discussions. Mr. Smart signed a written plea agreement before June 8 but he became dissatisfied with it and did not actually enter his guilty plea until after the June 8 meeting. The prosecutor was convinced that Mr. Smart would not going to enter the guilty plea unless there was a second meeting with Detective Sergeant Brown, and the prosecutor wanted more information about the homicide.

Even if the sole purpose of the June 8 meeting was to convince Mr. Smart that he would not get a better deal, the discussions during this meeting were plea discussions, because from the prosecutor's perspective, there would be no guilty plea until this meeting occurred.

RELIEF REQUESTED

Defendant-Appellee asks that the Supreme Court deny the Genesee County Prosecutor's application for leave to appeal.

Respectfully submitted,

Dated: October 23, 2014

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County of Genesee)

Daniel D. Bremer says that on October 23, 2014, he served a true copy of the following items upon Vikki Bayeh Haley, Assistant Prosecuting Attorney, at her address of record, 900 South Sginaw Street, Rm. 100, Flint, Michigan 48502 and upon Timothy A. Baughman, Assistant Prosecuting Attorney, at his address of record, 11th Floor, 1441 St. Antoine, Detroit, Michigan 48226 by first class mail:

Proof of Service

Brief in Opposition to Application for Leave to Appeal

I declare that the above statements are true to the best of my information, knowledge, and belief.

Dated: October 23, 2014

Daniel D. Bremer

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October 23, 2014

Clerk, Michigan Supreme Court
P.O. Box 30052
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Re: People v Mantrease Datrell Dequan Smart, Docket No. 149040

Dear sir or madam:

I am enclosing eight copies of the Defendant-Appellee's Supplemental Brief in Opposition to Application for Leave to Appeal and Proof of Service.

Sincerely,

Daniel D. Bremer